BIRD RICHARD
LAWYERS FOR EMPLOYERS

EMPLAWYERS'™ UPDATE

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In this Issue

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Beware the Fixed Term Contract

In *Howard v Benson Group Inc.*, the Ontario Court of Appeal concluded that employees employed under a fixed term contract that does not provide for early termination without cause, are entitled to payment of the unexpired portion of the contract upon early termination of the contract. The Court of Appeal also stated that the duty to mitigate does not apply to fixed term contracts that do not contain an express provision for early termination without cause.

In this case, the employee, John Howard, was employed by the Benson Group Inc., an automotive service centre in Bowmanville, as a Truck Shop Manager and then as a Sales Development Manager. His employment contract was for a five-year term beginning in September 2012. The employer terminated his contract, without alleging cause, 23 months after hiring him.

The employer's right to termination without cause was governed by a clause in the employment contract. The motion judge found this clause to be unenforceable due to ambiguity:

> "Employment may be terminated at any time by the Employer and any amounts paid to the Employee shall be in accordance with the Employment Standards Act of Ontario."

On Appeal, the Court of Appeal found that the motion judge erred both in awarding common law damages for wrongful termination rather than damages for termination of a fixed term contract and for finding that an award of damages for early termination of the employment contract is subject to a duty to mitigate:

- In the absence of an early termination clause, fixed term contracts rebut the common law presumption of reasonable notice on termination by providing the employee with a clear end date. In this case, the employer was not an "unsophisticated party" and if it wished to limit its liability at termination to common law notice they

should have included a clear provision to do so. Without such a clause, the Court of Appeal found that Mr. Howard was entitled to the remainder of his fixed-term contract as damages.

- The duty to mitigate does not apply to fixed term contracts that do not contain mitigation clauses. The Court held that there is no duty to mitigate where the contract specifies the penalty for early termination, whether that penalty is expressly defined or is, by default, the wages and benefits of the unexpired term of the contract. If the employer wished for Mr. Howard's duty to mitigate to apply, it should have been clearly stated in the employment agreement.

Whenever an employer seeks to limit its liability to the statutory minimum upon termination, a well drafted termination provision is essential and this decision demonstrates that this is the case even in fixed term contracts. It is also noteworthy that the duty to mitigate may not apply to the termination of fixed term employees without a clause to that effect.

Employers to Accommodate Employees who Have Experienced Sexual or Domestic Violence

The *Domestic and Sexual Violence Workplace Leave, Accommodation and Training Act, 2016*, or Bill 177, had its second reading on March 10, 2016 and is currently being considered by the Standing Committee on Justice Policy.

If passed, the Bill will:

- Amend the *ESA* to include definitions of "domestic violence", "intimate partner", and "sexual violence."
- Require employers to accommodate changes in work location and working hours for employees who, or whose children, have experienced domestic or sexual violence.
- Grant a leave entitlement to employees who, or whose children have experienced domestic or sexual violence. Any employee wishing to use this leave must use it for specific purposes (such as seeking medical attention or meeting with a lawyer) and inform their employer in writing.

Under the proposed legislation, employees would be eligible to be paid for up to ten days of leave each year. For both the accommodation and leave provisions, employers may request the employee to provide evidence reasonable in the circumstances that the employee is entitled to either the accommodation or the leave.

The Bill would also amend the *Occupational Health and Safety Act* requiring employers to "ensure that every manager, supervisor and worker receives information and instruction about domestic violence in the workplace and sexual violence in the workplace."

ORPP Cancelled in light of Agreement in Principle to Enhance CPP

Bill 186, O*ntario Retirement Pension Plan Act (Strengthening Retirement Security for Ontarians), 2016* received Royal Assent on June 9, 2016. The purpose of the Ontario Retirement Pension Plan was to be a provincially-managed pension plan aimed at providing retirement income to employees without pension plan options at work.

On June 20, 2016, Ontario Finance Minister Charles Sousa announced that the Ontario Retirement Pension Plan (ORPP) would be cancelled in light of an agreement in principle formed with the federal government to expand the Canada Pension Plan (CPP). The agreement in principle to enhance the CPP must be approved by all signatories no later than July 15, 2016.

This agreement, which has yet to be finalized, would be gradually phased in effective January 1, 2019, and would increase contributions made to the CPP.

Bird Richard will update readers once additional information in relation to the CPP expansion has been released.

New Act Limits Police Record Checks Disclosure and Standardizes Procedures

On December 1, 2015, the Government of Ontario passed Bill 113, the *Police Record Checks Reform Act, 2015*. The *Act*, which is not yet in force, states what information can be released through police record checks and creates uniformity in disclosure procedures. Consequently, individuals and organizations seeking to obtain police record checks will only be able to do so in the manner prescribed by the *Act*.

Currently, employers who require a police record check as part of their screening process may receive records of withdrawn charges, acquittals, mental health detentions and suicide attempts. Under the new legislation, police services are prohibited, except in limited circumstances, from disclosing mental health records, non-conviction records – such as acquittals and withdrawn charges – and records from police "carding" checks.

The *Act* applies to any individual or organization requiring a police check for purposes such as screening an individual to determine "his or her suitability for employment, volunteer work, a licence, an office, membership in any private body,

or to provide or receive goods" or for "assessing his or her application to an educational institution or program".

The *Act* also standardizes procedures pertaining to police record checks. The *Act* explicitly requires that police services provide the results of the record check to only the concerned individual and to no other party without that individual's consent. The *Act* also establishes a reconsideration framework should anyone believe that information has been erroneously included on their police record check. Moreover, the *Act* places a requirement on employers who receive information from a police record check to not use it or disclose it except for the purpose for which it was requested or as authorized by law.

New *ESA* Requirements Coming into Force for Tips and other Gratuities

On June 10, 2016 amendments the *Employment Standards Act, 2000* came into force and clarified procedures for managing tips and gratuities in the workplace. Notably, the amendment defines "tip or gratuity" and bars employers from withholding, deducting from, or causing the return of tips, or other gratuities, except as authorized.

The amendments include some exceptions to the bar on employer's withholding tips such as:

- when authorized by a federal or provincial statute, or by a court order.
- when they are collected and redistributed among some/all employees in order to administer a "tip pool".

Employers cannot take a share of tips unless they are a director, sole proprietor, partner or shareholder in the business, **and** regularly perform work done by employees who share in the redistribution, or if they regularly perform work that employees of other employers in the same industry regularly receive tips for.

A new regulation, *Tips and Other Gratuities*, O Reg 125/16, which also came into force on June 10, 2016, provides that tips/gratuities do not include the portion of a service charge imposed by a credit card company on an employer for processing a credit card payment by a customer.

AODA Update: Amendment to Reporting Requirements for Small Organizations

Effective July 1st, 2016, small organizations with more than 20 employees, but less than 50, are required to submit accessibility compliance reports with respect to customer service under the *Accessibility for Ontarians with Disabilities Act*. Prior to this amendment, these organizations were exempt from the requirement to file accessibility reports all together.

Please note that under the amendments, small organizations of 20 employees or less are still exempt from filing any accessibility reports.

Other notable changes to the *Integrated Accessibility Standards* include:

- **Changes related to acceptable providers of documentation confirming the need for a service animal:** the documentation confirming this must now come from a member of a regulated health profession;
- **Changes related to training requirements:** all employees and volunteers will be required to undergo training related to the provision of its goods, facilities or services to persons with disabilities whether they deal with members of the public or not; and
- **Changes to the feedback process:** all providers must ensure the feedback process is accessible to persons with disabilities by providing, or arranging for the provision of, accessible formats and communication supports, upon request.

Employer is Appealing $104,000.00 Award to Constructively Dismissed Employee

On March 14, 2016, Ms. Esther Brake, a 20 year employee of a McDonald's franchise, was awarded pay in lieu of notice equivalent to 20 months remuneration totaling $104,499.33.

Ms. Brake was put on McDonald's progressive discipline program and ultimately told that she failed the program and had to "take a demotion or go." Ms. Brake refused the demotion and was dismissed for cause.

Subsequently, Ms. Brake claimed that she was wrongfully constructively dismissed and sought damages for common law notice and severance in accordance with the *Employment Standards Act (ESA), 2000.*

In *Brake v PJ-M2R Restaurant Inc.*, 2016 ONSC 1795, the central issue was whether the Employer had cause to dismiss Esther Brake. The Judge determined that Ms. Brake had been constructively dismissed without cause and regardless of the fact that Ms. Brake began to work for a new employer during the notice period, the court did not offset the amounts to be paid by her mitigation income. The employer is appealing the decision and Bird Richard will provide an update on the status of the appeal.

Decision to strike down Random Drug and Alcohol Testing Policy is Unreasonable, Alberta Court Holds

In *Suncor Energy Inc. v Unifor Local 707A*, the Court of Queen's Bench of Alberta overturned an arbitration panel's decision to strike down the employer's random drug and alcohol testing policy on the basis that it failed to consider evidence of security problems in the workplace.

The employer, Suncor Energy Inc., operates in the Athabasca oil sands in the Wood Buffalo Municipality of Alberta. One third of Suncor's employees are represented by Unifor, one third are non-unionized, and the remaining employees are employed by contractors.

In June 2012, Suncor announced that it was implementing a Canada-wide drug and alcohol policy as well as a Random Testing Standard that would apply only to workers at the oil sands operations in the Wood Buffalo Municipality. Under this policy, employees working in safety-sensitive positions would be subject to random drug and alcohol testing. Unifor grieved Suncor's implementation of the Random Testing Standard alleging the policy was contrary to the collective agreement, to the common law and to applicable legislation.

The employer submitted evidence regarding "Alcohol and Drug Security Incidents" between 2004 and September 2013 which included reference to specific "finds": empty alcohol bottles, drug paraphernalia, drugs, whizzinators and other devices meant to adulterate a urine test.

At arbitration, the majority of a three member panel found that Suncor's Random Testing Standard ran contrary to the framework set out in the 2013 Supreme Court decision in *Irving*. In *Irving*, the Supreme Court of Canada held that, although a dangerous workplace does not in itself justify random drug and alcohol testing, a general problem with drugs and alcohol in the workplace might justify such a policy. The minority in the arbitration panel found that Suncor had established an ongoing workplace problem with drugs and alcohol and as such was justified in implementing the Random Testing Standard.

On judicial review, the Court found that the majority decision of the arbitration panel was unreasonable as it did not correctly apply the test in *Irving* for three reasons:

1. The arbitration panel set a higher threshold than articulated by the Supreme Court in *Irving* by requiring evidence of a serious or significant problem with drugs and alcohol rather than a general one;
2. By looking only at drug and alcohol use amongst employees who were members of the bargaining unit. The Court did not require evidence of a problem solely within the bargaining unit but rather of a general workplace problem. Further, the Court noted that workplace safety should be considered as an aggregate concept; and
3. By overlooking important evidence presented by Suncor relating to "security incidents" and by restricting their analysis to only the bargaining unit, the arbitration panel excluded consideration of evidence regarding alcohol and drug use pertaining to almost two-thirds of the oil sands operations workers.

For these reasons, the Court found that the arbitration panel's decision was unreasonable, quashed the decision and remitted the matter for arbitration before a new panel.

For employers, this decision provides clarification into the standard for implementation of random drug and alcohol testing policies in the workplace. It appears that evidence of a serious or significant problem with drugs and alcohol is not a prerequisite; rather, a "general" problem may be sufficient to justify such policies.

Ontario to Raise Minimum Wage

The Ontario government announced that the general minimum wage will be raised from $11.25 to $11.40 on October 1, 2016. The minimum wage rates for liquor servers will increase from $9.80 to $9.90 per hour. This raise, the tenth since 2003, maintains Ontario's minimum wage as the highest of any province in Canada. Minimum wage rates for students under the age of 18, hunting and fishing guides, and homeworkers will also increase at the same time.

Firm Announcement

The Firm welcomes our new Summer Student, Alexandra Callinan. Alexandra will be entering her second year in the University of Ottawa's Common Law Program this fall.